PP

v.

WONG KEE FATT

HIGH COURT MALAYA, ALOR STAR
ZAMANI RAHIM JC
[CRIMINAL TRIAL NO: 45-23-2006]
25 MARCH 2009

CRIMINAL PROCEDURE: *Sentence - Principles of - Accused charged for armed robbery - Penal Code, ss. 392 & 397 - Public interest - Deterrent sentence - Balance of interests of public and interests of accused - Factors considered - Penal Code, s. 34 - Firearms (Increased Penalties) Act 1971*

The accused was originally charged with an offence punishable under s. 3A of Firearms (Increased Penalties) Act 1971. Subsequently, the prosecution put in an alternative charge for armed robbery committed with another person still at large, an offence under s. 392 and s. 397 of the Penal Code read with s. 34 of the same. The accused pleaded guilty to the alternative charge and understood the nature and consequences of the plea. The court accepted the guilty plea of the accused and convicted him on the alternative charge. The issue that arose was the appropriate sentence to be passed taking into account the circumstances of the case.

Held (sentencing accused to eight years' imprisonment with effect from date of arrest and six strokes of whipping):

(1) Public interest demand that a deterrent sentence be passed on the robbers who are armed with firearms or dangerous weapons while committing the crime. The sentence must also deter others who are of like mind to commit similar crime. Armed robberies, nowadays, are not only rampant but brutal and vicious. The robbers not only threaten or terrorise the victims, in some instances, they have no hesitation to injure or even kill their victims. (paras 10 & 12)

(2) Although the pistol was never recovered and another person was still at large, the accused criminal liability, by no mean lessens, as he was charged with armed robbery with that runaway person in furtherance of common intention under s. 34 of the Penal Code. The law in s. 34 said that if the

criminal act is the result of a common intention, then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which he had in its perpetration. The accused could not shift the major bulk of criminal liability in the said robbery to his comrade. Unlike his comrade, the accused was captured, but it was not without high drama. The police patrol vehicle chased the motorcar driven by the accused on a highway until he was cornered and arrested. It was not a voluntary surrender by him which may operate as mitigating factors and indicating remorse and willingness to accept punishment for his crime. As regard the pistol which was not recovered, it was a point which was not in favour of the accused. The pistol may be floating in the street which continuously posed danger to the members of the public until it is seized. (paras 25 & 27)

(3) In the assessment of sentence, the correct approach was to strike a balance as far as possible between the interests of the public and the interests of the accused. In the circumstances of the case, having balanced the interests of the public and the interests of the accused, in the exercise of this court's discretion, the accused was sentenced to eight years imprisonment term with effect from the date of his arrest and six strokes of whipping. (paras 28 & 29)

Case(s) referred to:

Afrahim Sheikh, AIR [1964] SC 1263 ***(refd)***
Leong Ka Kong v. PP [1975] 1 LNS 86 HC ***(refd)***
Ong Lai Kim & Ors v. PP [1991] 2 CLJ 1568, [1991] 3 CLJ (Rep) 376 HC ***(refd)***
PP v. Burnanuddin [2006] 8 CLJ 409 HC ***(refd)***
PP v. Chan Choon Keong & Ors [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300 HC ***(refd)***
PP v. Chung Kwong Huah [1981] 1 LNS 67 HC ***(refd)***
PP v. Lee Meow Sim Jenny [1993] 3 SLR 885 ***(refd)***
PP v. Lee Tak Keong [1988] 1 LNS 217 HC ***(refd)***
PP v. Kamaruzaman Mahmud & Anor [2006] 4 CLJ 792 HC ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
Rex v. Grondkawski [1946] 1 All ER 560 ***(refd)***
Rex v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
Reg v. JH Sergeant [1975] 60 Cr App R 74 ***(refd)***
Muhamad Taufik Kamaluddin lwn. PP [2007] 8 CLJ 195 HC ***(refd)***
Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA ***(refd)***
Wong Kai Chuen Philip v. PP [1990] 1 LNS 146 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Firearms (Increased Penalties) Act 1971, s. 3A
Penal Code, ss. 34, 392, 397

For the prosecution - Teoh Chin Chong, DPP
For the accused - R Sankra Krishna; M/s R Sankra Krishna

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani Rahim JC:

[1] The accused was originally charged with an offence punishable under s. 3A of Firearms (Increased Penalties) Act, 1971. The charge reads as follows:

> Bahawa kamu pada jam lebih kurang 1.30 petang, 9.3.2005 di hadapan Kedai Kereta Terpakai Joo Hong, No. 605, Padang Temusu, Sungai Pasir, Sungai Petani, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman telah melakukan rompakan bersenjata bersama-sama seorang lain yang masih bebas di mana dua das tembakan telah dilepaskan sehingga menyebabkan kematian ke atas Beh Su Kiang (K.P No: 690812-08-6008) iaitu suatu kesalahan di bawah Seksyen 3A Akta Senjatapi (Penalti Lebih Berat) 1971 dan boleh dihukum di bawah Seksyen yang sama.

[2] Subsequently, on the date due for trial on 6 January 2009, the prosecution put in an alternative charge for armed robbery committed with another person still at large, an offence under s. 392 and s. 397 of the Penal Code read with s. 34 of the same Code. The alternative charge reads as follows:

> Bahawa kamu bersama-sama seorang lagi yang masih bebas pada 9.3.2005 jam lebih kurang 1.30 petang, di hadapan Kedai Kereta Terpakai Joo Hong, No. 605, Padang Temusu, Sungai Pasir, Sungai Petani, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman telah melakukan rompakan ke atas Huang Choon Eng K.P. No. 600225-02-5006 iaitu wang tunai sebanyak RM1,000.00, 10 utas rantai crystal bernilai RM1,000.00 dan satu unit telefon bimbit Nokia bernilai RM600.00 berjumlah RM2,600.00 dan semasa merompak kamu berdua telah menggunakan senjata yang boleh mendatangkan kematian, iaitu

A sepucuk pistol, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 392 dan 397 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[3] The original charge and the alternative charge were read and explained to the accused and he understood both charges. He, however, pleaded guilty to the alternative charge and understood the nature and consequences of his plea.

[4] The learned deputy public prosecutor had tendered a written statement of facts which are reproduced below.

Fakta Kes

Pada 9.3.2005 jam lebih kurang 1.30 petang, pengadu Huang Choon Eng K.P. No. 600225-02-5006 bersama tiga orang kawannya telah menaiki sebuah kereta Satria berwarna hijau No. JFL 129 untuk pergi makan tengahari di Padang Temusu, Sungai Petani, Kedah Darul Aman.

Semasa dalam perjalanan, pengadu telah berhentikan kereta tersebut di tepi Kedai Kereta Terpakai Joo Hong di No. 605, Padang Temusu, Sungai Petani, Kedah Darul Aman untuk mencari suaminya bernama Yeoh Liang Hua K.P. No. 560901-02-5631 di dalam pejabat tersebut. Pada masa tersebut, tertuduh bersama seorang lagi yang masih bebas yang datang dengan menaiki sebuah kereta Wira berwarna biru No. PDL 7952 terus melakukan rompakan bersenjata sepucuk pistol ke atas sebuah beg duit yang berada di dalam kereta pengadu tersebut serta wang tunai sebanyak RM1,000.00, 10 utas rantai crystal bernilai RM1,000.00 dan satu unit telefon bimbit Nokia bernilai RM600.00, berjumlah RM2,600.00 kepunyaan pengadu. Tertuduh bersama seorang lagi yang masih bebas itu telah melarikan diri selepas melakukan rompakan tersebut. Pengadu telah membuat satu repot seperti Sungai Petani Repot No. 3210/05.

Bertindak di atas maklumat, pada hari yang sama jam lebih kurang 2.00 petang, tertuduh telah berjaya ditangkap oleh Kpl. 110149 Mohamad Fuad dan rakannya di KM 63 Lebuhraya Sungai Petani - Alor Star setelah kejar mengejar dilakukan di antara kereta MPV 267 yang dipandu oleh Kpl. 110149 Mohamad Fuad bersama rakannya serta kereta Wira berwarna biru No. PDL 7952 yang dipandu oleh tertuduh.

Pemeriksaan yang dilakukan ke atas tertuduh tidak menjumpai apa-apa barang yang dilaporkan rompak serta senjata pistol yang digunakan.

Hasil siasatan polis yang dijalankan oleh ASP Wan Zairi Afhtar bin Ishak menunjukkan bahawa tertuduh telah melakukan kesalahan tersebut bersama seorang lagi yang masih bebas seperti pertuduhan pilihan.

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Timbalan Pendakwaraya

[5] The statement of facts were read and explained to the accused and he admitted the facts as being true. The court then accepted the guilty plea of the accused and convicted him on the alternative charge.

[6] On behalf of the accused, his counsel advanced the following mitigation.

a) The accused pleaded guilty, save time and costs.

b) The accused was a plaster ceiling contractor.

c) He was a first offender.

d) Did not intend to associate with friends with bad record anymore.

e) He had been in prison for about four years and sought a minimum imprisonment term be imposed.

[7] The following authorities were relied upon by the accused's counsel in support of his submission.

1) *PP v. Kamaruzaman Mahmud & Anor* [2006] 4 CLJ 792

The accused pleaded guilty to the charge armed robbery under ss. 392 and 397 of the Penal Code. On appeal the order of binding over under s. 294 CPC, by the learned magistrate was set aside and substituted with the sentence of 30 months' imprisonment which was to take effect from the date of sentence.

2) *Soosainathan v. PP* [2001] 6 CLJ 44

The accused was charge with a drug offence and he pleaded guilty thereto. His previous conviction showed that he had been convicted for armed robbery under s. 392 and s. 397 of the Penal Code where he was sentenced to 24 months' imprisonment and ordered to be given two strokes of the rotan.

A 3) *PP v. Chan Choon Keong & Ors* [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300

The charge against the second accused was altered to one under s. 392 and s. 397 of the Penal Code (armed robbery). B The second accused was sentenced to a term of six years imprisonment from the date of arrest and ordered to be given two strokes of whipping.

[8] In reply, the learned deputy public prosecutor submitted as follows: C

a) The accused had no previous conviction.

b) The offence of robbery armed with a pistol was a serious offence.

D c) The accused had caused fear to the victim and her properties were robbed.

d) Pleaded a heavy imprisonment term be imposed and whipping.

E **[9]** The following authorities were cited by the learned deputy.

1) *PP v. Tia Ah Leng* [2000] 5 CLJ 614

> Held (2) The rule that an accused person should be given credit or discount for pleading guilty as it saves time and F costs is only a general rule. The demands of public interest may in the circumstances of a particular case far outweigh any mitigating effect that might have been attached to an accused guilty plea.

2) *Leong Ka Kong v. PP* [1975] 1 LNS 86 HC

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The appellant was convicted and sentenced on four charges of robbery with deadly weapons. The learned president sentenced him to seven years' imprisonment on each charge with three strokes of the rotan.

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The appellant appeals were dismissed.

3) *Ong Lai Kim & Ors v. PP* [1991] 2 CLJ 1568, [1991] 3 CLJ (Rep) 376

I Three appellants were tried and convicted of rape and robbery after a trial.

The first appellant was sentenced to eight years' imprisonment and four strokes of rotan for the robbery. The second appellant was sentenced to eight years' imprisonment and four strokes of rotan for the robbery.

Zakaria Yassin J said at in respect of the robbery offence.

> Similarly, the punishment for the robbery offence must also be deferent in nature. The appellants are no doubt first offenders but as they have been convicted of a serious crime involving violence, the primary consideration of the court is the element of public interest and society's abhorrence of this type of crime: see *Goh Chong Wee v. PP*.

The appellant appeals were dismissed.

[10] Now what is the appropriate sentence to be passed in the circumstances of this case. The accused was charged with an offence of armed robbery under s. 392 and s. 397 of the Penal Code. It is a very serious offence. The punishment is reflected in the both sections. Section 392 and s. 397 stipulate as follows:

> S. 392 Whoever commits robbery shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine; and if the robbery be committed between sunset and sunrise the imprisonment may be extended to fourteen years, and he shall also be liable to fine or to whipping.

> S. 397 If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may liable under any other section of this Code.

[11] In imposing sentence, I am guided by several considerations, the top and prime consideration is the public interest. This was recognised as long ago in 1951 where in the English case of *Rex v. Kenneth John Ball* [1951] 35 Cr App R 164, Hilbery J said as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be

A tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest
B is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard
C to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[12] The public interest demand that a deterrent sentence be passed on the robbers who are armed with firearms or dangerous
D weapons while committing the crime. The sentence must also deter others who are of the like mind to commit similar crime. Armed robberies, nowadays, are not only rampant but brutal and vicious. The robbers, not only threaten and terrorise the victims, in some instances they have no hesitation to injure or even kill their
E victims. In *PP v. Lee Tak Keong* [1988] 1 LNS 217, Zakaria Yatim, J (as he then was) said as follows:

> The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries: see *Goh Chong Wee v. PP* Federal
F Territory Criminal Application No CR 52-60-1987 (unreported) (refd) and *PP v. Mustanina bin Daing Sinring and Anor* Criminal Application No 51-125 of 1987 (unreported) (refd). In cases of robbery the court must take into consideration the element of public interest. This means that the court must impose a deterrent
G sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his
H friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.
>
> I must add that in imposing sentence in this case, the court must
I also consider society's abhorrence of this type of crime.

[13] In another case *PP v. Chung Kwong Huah* [1981] 1 LNS 67, Chan J said as follows: A

> In recent years, there have been for too many cases of robbery being committed with the use of firearms. Defenseless men and women have been robbed and sometimes brutally attacked by armed men. Police officers have been shot at and some were injured or even killed by these ruthless men. Robberies and crimes of violence are almost daily occurrences and in many cases firearms were used: see *Lee Chow Meng* [1976] 1 MLJ 287. B

[14] His Lordship went on to say: C

> The public is entitled to be protected and it is not likely to be so protected if lenient sentences are passed.

[15] In the English Court of Appeal in *Reg v. JH Sergeant* [1975] 60 Cr. App. R. 74, 77, 78. D

> Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences.

[16] Apart from the authorities cited by the prosecution and defence, I, on my own, look up some authorities to determine the trend of sentencing for offences under s. 392 and s. 397 of the Penal Code which are now produced below. E

[17] In the case of *PP v. Burnanuddin* [2006] 8 CLJ 409, on a charge of armed robbery under s. 392 and s. 397 of the Penal Code, on pleading guilty the learned magistrate sentenced the accused to 30 months imprisonment and one stroke of rattan. F

[18] On revision by Abdull Hamid Embong J (as he then was), the facts disclosed that the accused, an Indonesian was charged with an offence of armed robbery under s. 392 and s. 397 of the Penal Code as follows: G

> Bahawa kamu bersama-sama 2 orang lagi rakan kamu yang masih bebas pada 7.9.2004 lebih kurang jam 3.45 pagi bertempat di no 3788 Jalan Lembah Ledang Off Jalan Duta di dalam Daerah Brickfields di dalam Negeri Wilayah Persekutuan Kuala Lumpur telah melakukan samun wang tunai sebanyak RM500.00, pelbagai jenis barang kemas bernilai RM7,500.00, 5 jam pelbagai jenama bernilai RM6,000.00, 4 buah handphone jenis Nokia bernilai RM3,000.00 dan jumlah kesemuanya bernilai RM16,700.00 dengan bersenjatakan sebilah pisau dan pemutar skru yang boleh H I

A menyebabkan ketakutan dan kematian terhadap seorang lelaki bernama Shikh Ab. Wahab bin Shikh Anuar Kad Pengenalan 520221-03-5469. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 392/397 Kanun Keseksaan dan boleh dihukum di bawah seksyen dan Kanun yang sama, serta dibaca
B bersama dengan seksyen 34 Kanun Keseksaan.

[19] Having analysed the principles of sentencing, His Lordship enhanced the sentence of imprisonment term to seven years and five strokes of rattan. The sentence was to commence upon completion of his detention under detention order issued by the
C Home Minister dated 5 August 2005.

[20] In the case of *Muhamad Taufik Kamaluddin lwn. PP* [2007] 8 CLJ 195, the appellant and two others were charged for an offence of robbery under s. 392 of the Penal Code and he
D pleaded guilty thereto. The charge read as follows:

Bahawa kamu bersama-sama pada 25/11/2005 lebih kurang jam 1.45 pagi di rumah no. 32, Kg. Johor Lama, Telok Sengat, di dalam Daerah Kota Tinggi, di dalam Negeri Johor, di dapati telah melakukan samun terhadap Mohd. Aerin bin Mohd. Sarif KPT:
E 751212-01-5915 dengan mengambil sebuah perakam video jenis Sony, (1) kamera jenis Olympus, barangan kemas, rokok pelbagai jenis dan wang tunai yang jumlahnya bernilai lebih kurang RM22,340.00. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 392 Kanun Keseksaan dan boleh
F dihukum di bawah seksyen yang sama.

[21] The facts are these. The appellant and two others had entered the complainant's house at about 1.45am on 25 November 2005 and committed robbery therein, armed with a knife and screw driver. The complainant and his wife were tied
G with wires. The appellant and two others ransacked the house and took several items namely, a handphone, camera, wrist watch and necklace valued at RM22,340.

[22] The appellant and two others were sentenced to ten years
H of imprisonment each with effect from the date of arrest and each of them was ordered to receive eight strokes of whipping by the learned Sessions Court judge.

[23] The appellant appealed to have the imprisonment term and
I the order of whipping be reduced. The High Court observed that the sentence was appropriate and the learned Sessions Court judge had not transgressed any legal principles. His Lordship

refused to interfere with the discretion exercised by the learned Sessions Court judge and the sentence was confirmed. The appellant's appeal was dismissed.

[24] Whatever has been said so far, I do not lose sight the submission of counsel on behalf of the accused that the accused had pleaded guilty to the alternative charge and thus saved the court's time and expenses to the public coffers. In the Court of Appeal case of *Kesavan Baskaran v. PP* [2008] 6 CLJ 390, Gopal Sri Ram, JCA said at p. 394:

> Generally speaking, a plea of guilt is a strong mitigating circumstances operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed so heinous that a plea of guilt need be given little or no weight. The need to protect the public is another factor that may prevail over a plea of guilt.

[25] The counsel also submitted that the pistol was never recovered and another person was still at large. Though another person is still on the run, the accused criminal liability, by no mean lessen, as he was charged with armed robbery with that runaway person in furtherance of common intention under s. 34 of the Penal Code. The law in s. 34 says that if the criminal act is the result of a common intention, then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which he had in its perpetration: see *Afrahim Sheikh*, AIR [1964] SC 1263. The accused cannot shift the major bulk of criminal liability in the said robbery to his comrade. Unlike his comrade, the accused was captured, but it was not without high drama. The police patrol vehicle chased the motorcar driven by the accused on a highway until he was cornered and arrested. It was not a voluntary surrender by him which may operate as mitigating factors and indicating remorse and willingness to accept punishment for his crime. In *Kesavan Baskaran*, *supra*, Gopal Sri Ram cited what was said by Chan Sek Keong J (as he then was) in *Wong Kai Chuen Philip v. PP* [1990] 1 LNS 146 as follows:

> ... the voluntary surrender by an offender and a plea of guilt by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend

A

> on the circumstances of each case. I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up

B

[26] The above principle was followed and endorsed in the case of *PP v. Lee Meow Sim Jenny* [1993] 3 SLR 885.

[27] As regard the pistol which was not recovered, it is a point which is not in favour of the accused. I say so because the pistol
C is still floating in the street which continuously pose danger to the members of the public until it is seized.

[28] Finally, in the assessment of sentence, the correct approach is to strike a balance, as far as possible, between the interests of
D the public and the interests of the accused. In *Rex v. Grondkawski* [1946] 1 All ER 560, Lord Goddard LCJ had advised judges in the following words.

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or
E seems to be thought, that the interests of justice means only the interests of the prisoners.

[29] In the circumstances of this case, having balanced the interests of the public and the interests of accused, in the exercise
F of my discretion, I sentenced the accused to eight years imprisonment term with effect from the date of his arrest and six strokes of whipping.

[30] As can be seen, the accused was apprehended by the police about half an hour (1/2) after the robbery. I wish to record my
G appreciation to the police efficiency for solving this crime almost immediately after its commission, despite the pistol and the loots were not recovered.

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I